PUBLIC HEALTH COUNCIL

Meeting of the Public Health Council, held Tuesday, May 25, 2004, at 10:00 a.m., at the Massachusetts Department of Public Health, Henry I. Bowditch Public Health Council Room, 250 Washington Street, Boston, Massachusetts. Public Health Council Members present were: Commissioner Christine C. Ferguson, Chair, Ms. Phyllis Cudmore, Mr. Manthala George, Jr., Ms. Maureen Pompeo, Mr. Albert Sherman, Ms. Janet Slemenda, Mr. Gaylord Thayer, Jr. and Dr. Martin Williams; Dr. Thomas Sterne absent. Also in attendance was Attorney Donna Levin, General Counsel.

Chair Ferguson announced that notices of the meeting had been filed with the Secretary of the Commonwealth and the Executive Office of Administration and Finance, in accordance with the Massachusetts General Laws, Chapter 30A, Section 11A ½. In addition, Chair Ferguson announced that the scheduled Staff Presentation: "Traumatic Brain Injuries in Massachusetts: An Overview of the Data", by Holly Hackman, MD,MPH, Director, Injury Surveillance Program, Center for Health Information, Statistics, Research and Evaluation, has been postponed until the next meeting of the Council. Lastly, Ms. Ferguson stated the order of the docket items being heard today are changed as follows: Items 1 and 2 stay the same; #4 Project Application No. 4-1464 of Linden Ponds, Inc.; 3a and then 3b.

The following members of the Staff appeared before the Council to discuss and advise on matters pertaining to their particular interests: Attorney Carol Balulescu, Deputy General Counsel, Office of the General Counsel; Ms. Joyce James, Director, and Mr. Jere Page, Senior Analyst, Determination of Need Program; and Dr. Paul Dreyer, Associate Commissioner, Center for Quality Assurance and Control.

RECORDS OF THE PUBLIC HEALTH COUNCIL MEETINGS OF DECEMBER 16, 2003; FEBRUARY 24, 2004 and MARCH 30, 2004:

Records of the Public Health Council Meetings of December 16, 2003, February 24, 2004 and March 30, 2004 were presented to the Council for approval. After consideration, upon motion made and duly seconded, it was voted: (unanimously) [Ms. Pompeo not present to vote] to approve the Records of the Public Health Council Meetings of December 16, 2003; February 24, 2004; and March 30, 2004 as presented.

PERSONNEL ACTIONS:

In a letter dated May 13, 2004, Val W. Slayton, MD, MPP, Interim Director of Medical Services, Tewksbury Hospital, Tewksbury, recommended approval of the reappointments to the various medical staffs of Tewksbury Hospital. Supporting documentation of the appointees' qualifications accompanied the recommendation. After consideration of the appointees'qualifications, upon motion made and duly seconded, it was voted (unanimously): [Ms. Pompeo not present to vote] That, in accordance with recommendation of the Interim Director of Medical Services of Tewksbury Hospital, under the authority of the Massachusetts General Laws, chapter 17, section 6, the

following reappointments to the various medical staffs of Tewksbury Hospital be approved for a period of two years beginning May 1, 2004 to May 1, 2006:

REAPPOINTMENTS:	**MASS. LICENSE NO.:**	**STATUS/SPECIALTY:**
Kelly Clark, MD	81665	Affiliate Psychiatry
Stephen Ellen, MD	73606	Affiliate Psychiatry
Nilda Laboy, PsyD	7654	Allied Psychology
Carmencita Lopez, MD	76374	Active Staff Internal Medicine Consultant Neurology
Tzvetan Tzvetanov, MD	204641	Affiliate Internal Medicine

In a letter dated May 14, 2004, Paul Romary, Executive Director, Lemuel Shattuck Hospital, Jamaica Plain, recommended approval of the appointments and reappointments to the various medical staffs and allied health professional staff of Lemuel Shattuck Hospital. Supporting documentation of the appointees' qualifications accompanied the recommendation. After consideration of the appointees'qualifications, upon motion made and duly seconded, it was voted (unanimously): [Ms. Pompeo not present to vote] That, in accordance with recommendation of the Executive Director of Lemuel Shattuck Hospital, under the authority of the Massachusetts General Laws, chapter 17, section 6, the following appointments and reappointments to the various medical staffs and allied health professional staff of Lemuel Shattuck Hospital be approved:

APPOINTMENTS:	**MASS. LICENSE NO.:**	**STATUS/SPECIALTY:**
Nathan Van Houzen, MD	220335	Consultant/Internal Medicine
Panagiotis Vlagopoulos,MD	207726	Consultant/Internal Medicine
Halch Rokni, MD	213066	Consultant/Psychiatry
REAPPOINTMENTS:	**MASS. LICENSE NO.:**	**STATUS/SPECIALTY:**
Denis Derman, MD	71738	Active/IM;Hem/Medical Onc.
Stephen Drewniak, MD	43997	Active/Internal Medicine;GI
Bharani Padmanabhan, MD	209168	Consultant/Neurology
Simran Singh, MD	215213	Consultant/Internal Medicine
Robert Tarpy, MD	72824	Internal Medicine;Pulmonary
Maria Warth, MD	53898	Internal Medicine ;Endocrine
Philip Daoust, MD	38150	Consultant/Pathology
Neil Halin, DO	74366	Consultant/Radiology
Adriana Carrillo, MD	209121	Active/Orthopedic Surgery
Bruce Swartz, PsyD	4345	Allied Health Professional

In a letter dated May 4, 2004, Blake Molleur, Executive Director, Western Massachusetts Hospital, Westfield, MA, recommended approval of the appointment of Alla Tchesnovetskaya, MD to the affiliate medical staff of Western Massachusetts Hospital. Supporting documentation of the appointee's qualifications accompanied the recommendation. After consideration of the appointee's qualifications, upon motion made and duly seconded, it was voted (unanimously) [Ms. Pompeo not present to vote]: That, in accordance with recommendation of the Executive Director of Western Massachusetts Hospital, under the authority of the Massachusetts General Laws, chapter 17, section 6, the following appointment to the affiliate medical staff of Western Massachusetts Hospital be approved:

APPOINTMENT:	**MASS. LICENSE NO.:**	**STATUS/SPECIALTY:**
Alla Tchesnovetskaya, MD	153045	General Medicine/Geriatrics

DETERMINATION OF NEED: CATEGORY 1 APPLICATION:

PROJECT APPLICATION NO. 4-1464 OF LINDEN PONDS, INC.: for new construction of a 236-bed Level II Skilled Nursing Facility as part of a 1,875 residential unit Continuing Care Retirement Community called Linden Ponds Retirement Community to be located at 411 Whiting Street, Hingham, MA.

Note for the record: Council Member Maureen Pompeo arrived at the meeting at approximately 10:05 a.m., during Mr. Page's presentation on Linden Ponds.

Mr. Jere Page, Senior Analyst, Determination of Need Program, presented the Linden Ponds application. He noted, "…The applicant, Linden Ponds, Inc., is before the Council today seeking approval for new construction of a 236-bed Level II skilled nursing facility as part of a 1,875 residential unit Continuing Care Retirement Community, otherwise known as a CCRC. This will be located at 411 Whiting Street in Hingham. Just a note: 1,747 of these 1,875 residential units will be independent care units, and the remaining 128 units will be fully assisted living. Linden Ponds, Inc., which is a newly formed Maryland non-stock corporation, will be developed and managed by Erickson Retirement Communities, LLC, with a place of business at 701 Maiden Choice Lane in Baltimore. The Board of Directors of Linden Ponds, Inc. is also the Board of Directors of a number of other CCRCs, including the previously approved by the Council Brooksby Village CCRC in Peabody. This will be a Type A CCRC where residents sign a contract that explicitly provides them with full and lifetime nursing care as needed. The resident is responsible for payment of some portion of the cost of this care, and the CCRC sponsor is responsible for the remaining cost. No third party, with the exception of the resident's insurers, is liable for the cost of the care. If the resident depletes his or her personal resources, the CCRC assumes the burden of payment rather than public assistance. Please note that these nursing home beds associated with the Type A CCRC are exempt from the Department's nursing home bed need projections because these facilities are often what is known as true "lifecare" with a guarantee that the residents will be cared for without the use of public assistance, e.g., Medicaid funds. The recommended major

capital expenditure (MCE) for this project is $22,600,873 and reflects a construction cost which is well below what would be allowed under the Marshall and Swift Evaluation Service Calculations which we use to judge our construction costs. The applicant proposes to finance the MCE for construction of the nursing home beds with a 10 percent equity contribution, which is roughly $2.2 million. The remaining MCE of over $20 million will be financed with a construction loan from Bank of America for a term of seven years with an interest rate at .25 percent above the prime rate. We are recommending approval of this project with the conditions listed in the Staff summary."

After consideration, upon motion made and duly seconded, it was voted unanimously to approve **Projection Application Number 4-1464 of Linden Ponds, Inc**., based on Staff findings, with a recommended revised maximum capital expenditure of $22,600,873 (June 2003 dollars) and revised first year incremental operating costs of $13,997,047 (June 2003 dollars). A summary is attached and made a part of this record as **Exhibit Number 14,786**. This Determination is subject to the following conditions:

1. Linden Ponds Inc. d/b/a Linden Ponds Retirement Community, is proposing to build a Continuing Care Retirement Community (CCRC) at 411 Whiting Street in Hingham, MA consisting of 1,875 housing units together with a 236-bed Level II nursing home or SNF, which will serve only the residents of the Life Care Community.

2. The application was filed as an unique application pursuant to 105 CMR 100.302(B) of the Determination of Need Regulations because as a Type A CCRC Level II bed nursing home, it will only be open to residents of the CCRC and will be supported entirely by private funds.

3. The health planning process for this project was satisfactory.

4. The proposed project qualifies a Type A facility under the Continuing Care Retirement Community Guidelines. Therefore, the 236 beds associated with this facility are exempt from the nursing home bed need projections, which show a surplus of existing beds in the years 2005 and 2010, resulting in a two-year moratorium on the construction of new nursing home beds voted by the Public Health Council at its meeting on January 27, 2004, as discussed under the health care requirements of the Staff summary.

5. The project, with adherence to certain conditions, meets the operational objectives of the Nursing Facility Guidelines.

6. The project, with adherence to a certain condition, meets the standards compliance factor of the Nursing Facility Guidelines.

7. The recommended maximum capital expenditure (MCE) of $22,600,873 (June 2003 dollars) is reasonable, assuming no Medicaid reimbursement.

8. The estimated operating costs of $13,997,047 (June 2003) for the project's first full year of operation (FY2011) are reasonable, assuming no Medicaid reimbursement.

9. The project is financially feasible and within the financial capability of the applicant.

10. The project meets the relative merit requirements of the Nursing Facility Guidelines.

11. The project is exempt from the community health initiatives of the Nursing Facility Guidelines.

12. The Division of Health Care Finance and Policy provided general comments on the proposed project regarding MassHealth reimbursement for capital costs. However, the DHCFP comments are not pertinent to the proposed project, as no Medicaid reimbursement will be sought for the project's nursing home patients.

13. The Executive Office of Elder Affairs (EOEA) submitted no comments on the proposed project.

14. The Division of Medical Assistance submitted no comments on the proposed project.

Staff's recommendation was based on the following findings:

1. Linden Ponds, Inc. shall not admit Medicaid patients or seek Medicaid funds for residents of the CCRC. Linden Ponds Retirement Community, as a Type "A" CCRC long term care facility granted Unique Application status, is precluded from accepting Medicaid patients.

2. Linden Ponds, Inc. shall accept the maximum capital expenditure of $22,600,873 (June 2003 dollars) as the final cost figure except for those increases allowed pursuant to 105 CMR 100.751 and 752.

3. Linden Ponds, Inc. shall contribute 10% ($2,260,093 in June 2003 dollars) in equity of the final approved maximum capital expenditure.

4. Linden Ponds, Inc. shall not commence construction of its initial 104 nursing home beds until 300 independent care units have been presold, shall not commence construction of the next 44 nursing home beds until 200 additional independent care units have been presold, and shall not commence construction of the remaining 88 nursing home beds until 374 additional independent care units have been presold.

5. Linden Ponds, Inc. shall comply with the residency agreement/contract submitted to the Determination of Need Office on August 29, 2003, which meets the contractual requirement criteria to qualify as a "Type A" CCRC facility.

6. Linden Ponds, Inc. shall, prior to construction, sign formal affiliation agreements with at least one local acute care hospital and one local home care corporation that include provisions for respite care services.

7. The total approved gross square feet (GSF) for this project shall be 137,048 GSF of new construction for the 236 Level II beds, which Linden Ponds, Inc. may construct at its own risk.

8. Linden Ponds, Inc. shall obtain Medicare certification for its Level II beds.

9. Prior to commencing construction of the planned initial phase of the CCRC, Linden Ponds, Inc. shall submit documentation of maintenance of restricted reserve funds to cover refunds and operations.

10. Linden Ponds, Inc. shall adhere to the terms of 105 CMR 100.552(B) by filing a progress report regarding compliance with the above conditions with the DoN Program once within two years after implementation of this project. The report shall be filed annually thereafter.

For the record, the applicant, represented by Daniel O'Brian, attended the meeting but did not testify or get called upon to answer questions on Linden Ponds, Inc.

REGULATIONS:

REQUEST FOR PROMULGATION OF AMENDMENTS TO 105 CMR 130.000: HOSPITAL LICENSURE, REGARDING PROCEDURES FOR CONSENT TO AUTOPSY:

Ms. Carol Balulescu, Deputy General Counsel, Department of Public Health, presented the request for promulgation of amendments to 105 CMR 130.000 Hospital Licensure, Regarding Procedures for Consent to Autopsy. Atty. Balulescu said, "…The Department is requesting approval to promulgate amendments to 105 CMR 130.000, the regulations governing hospital licensure. The purpose of these amendments is to set forth minimum requirements for the consent to autopsy including consent to the disposition of organs removed during an autopsy. The amendments will require hospitals to: obtain consent in order to conduct an autopsy; use a consent form that meets the minimum requirements set forth in the regulation; return any organs removed during the autopsy with the body (except for those organs for which belonged fixation or detailed examination is required to complete the autopsy) unless the person authorizing the autopsy directs otherwise; provide a copy of the consent form to the person who authorized the autopsy; and establish written policies and procedures for obtaining and documenting consent to autopsy and disposition of organs. The amendments will also establish the same order of

priority for persons authorized to give consent as is specified in 105 CMR 800.030, which is the DPH regulation governing organ donation. The Department held a public hearing on April 28th. Three persons testified at the public hearing and the Department received six written comments. We prepared a memo to you that summarized the comments. Attached to the memo is a version of the regulations that shows changes made as a result of the public comments. Briefly, the changes clarify the following: The purpose of the autopsy may be stated in general terms. If the family member expresses a request that the hospital deems unreasonable, or a concern that the hospital cannot address, and notes these on the form, then the hospital shall not perform the autopsy. The hospital may indicate that organs may be retained for detailed examination as well as prolonged fixation. And if the hospital does not know for certain at the time of autopsy which particular organs may meet these criteria, it must specify a particular date and time by which it will advise the family member. Any requested disposition of organs must be in compliance with all applicable requirements and consent will be valid if any opposition to an autopsy is not known to the hospital at the time it undertakes an autopsy. Upon approval, these amendments will be filed with the Secretary of the Commonwealth for publication in the June 18th Massachusetts Register. At that time, they will become effective." A brief discussion followed by the Council.

After consideration, upon motion made and duly seconded, it was voted (unanimously) to approve the request for **Promulgation of Amendments to 105 CMR 130.000: Hospital Licensure, Regarding Procedures for Consent to Autopsy**; that a copy be forwarded to the Secretary of the Commonwealth; and that a copy be attached and made a part of this record as **Exhibit Number 14,787**.

REQUEST FOR APPROVAL TO PROMULGATE EMERGENCY AMENDMENTS TO 105 CMR 170.000: EMERGENCY MEDICAL SERVICES SYSTEM AND 105 CMR 150.000: LICENSING OF LONG TERM CARE FACILITIES:

For the record: Council Member Janet Slemenda said, "I abstain from any discussion or a vote on this because of a conflict of interest."

Dr. Paul Dreyer, Associate Commissioner for the Center for Quality Assurance and Control, presented the emergency amendments to 105 CMR 170.000 and 105 CMR 150.000 to the Council. Dr. Dreyer stated, "…I am here to today to request the Council's approval of emergency promulgation of amendments to two sets of regulations governing nursing home licensing and regulations governing the Emergency Medical System....First, let me give you some background. Under EMS 2000, what's called service zone planning is at the heart of community-based EMS service delivery. The statute calls for community-based EMS service delivery. The statute calls for local jurisdictions to develop service zone plans to coordinate, integrate, and implement EMS delivery and to designate service zone providers. The regulations implementing EMS 2000 service zone regulations were promulgated on July 18, 2003. Since that time, as the Department had worked to craft materials to aid in implementing these regulations, it's become apparent that the role that emergency first response services play in responding

to calls to help facilities with private ambulance contracts remains a source of controversy. The service zone regulations explicitly require service zone recognition of provider contracts when the private ambulance provider is able to meet service zone performance standards. But at the same time, the regulations permit local jurisdictions to specify the circumstances under which emergency first response services would be dispatched to all calls. And this set-up, these two provisions of the regulations set up a local planning process which had a potential to put local community providers at odds with one another. The purpose of the current amendments is to resolve this issue so that we can move forward with service zone planning..."

Dr. Dreyer continued, "In simplest terms, the amendments to the EMS regulations prohibit service zone plans from requiring that a designated emergency first response service be dispatched to a nursing home or assisted living facility that has a contract with a private ambulance provider when the facility makes a request for an emergency response directly to that provider, so long as the facility is staffed round the clock with licensed health care professionals on site. That's always the case in nursing homes. That may or may not be the case in assisted living. The companion amendment to the nursing home regulations requires nursing homes to develop explicit policies about when to access a contracted provider or the 911 system for an emergency response. The effect of these regulatory changes will be to place responsibility and accountability for properly accessing the emergency response system on the licensed or certified entity. We want to hold nursing homes and assisted living facilities accountable for the decisions they make with respect to accessing emergency response. The proposed amendments do not exempt private ambulance services from service zone standards for response time, nor do they prohibit nursing homes with private contracts from calling 911."

"Finally," Dr. Dreyer said, "why is this an emergency? Why are we requesting an emergency promulgation? The statute was signed into law in 2000. The regulations were promulgated in July 2003. We have heard from numerous cities and towns that they want to get started with the business of service zone planning. We need to resolve this issue as quickly as possible in order to move forward with service zone planning and emergency promulgation is the best way to do that." It was noted that the regulations must within 90 days be again presented to the Council for action. A public hearing will be held on July 6, 2003.

Discussion followed, whereby Council Member Pompeo asked whether this regulation would continue the status quo. Dr. Dreyer replied, "In the current situation, nursing homes call 911 or they call their contracted providers as they choose. In doing some research on this recently, it's been clear that nursing homes often don't have explicit policies about what they ought to do. This emergency regulation will change the status quo by requiring nursing homes to have explicit policies. In that sense, it is a change from the status quo because it requires nursing homes to be explicit and clear about what they are doing, which will enable us to hold them accountable."

Dr. Dreyer replied in response to Council questions: "If a patient is emergently ill, they call the private contracted ambulance service or they call 911. That will not change if

these regulations are passed. What will change is that the nursing home will need to have an explicit set of standards that it will follow in making that choice." It was further noted that the local service zone plan will set a standard response time for all services in its area that provide what's called primary response. That applies to both private contracted providers and to municipal providers. It applies to all licensed services.

Council Member Sherman stated in part, "…I'm fearful and rather sure that this isn't going to work the way it says on the paper. And I would like to know more about it. I don't think it is an emergency because we have been sitting on this when Lou Bertonazzi was the Chairman of the Healthcare Committee."

Council Member Pompeo added, "I just want to address the issue of an emergency – knowing a little bit about the nursing home business and the fact that there are no policies in place for how to respond to a situation. To me it's concerning and I mean I would support it on that basis alone, that we need to have something in place as soon as possible. If we are going to revisit this in 90 days, it seems like a reasonable stop gap."

Council Member Sherman said further, "On the other hand, I think that if we are going to revisit it in 90 days, why can't we have somebody take a look at this, somebody independent take a look at this, evaluate it and on the basis of what is real out there, not what is in theory, and come back to the Council….I don't see the emergent nature. I don't. We have been living with this for so long. If we can study this and come back in 60 days with something real then instead of getting a bunch of mail and having to be lobbied on this by half the immediate world or anybody living on this side of the planet…"

Chair Ferguson added, "I don't see this as a solution. I think we have to move forward. The reason that this is an emergency is that it hasn't happened. And cities and towns, the folks who are involved in this, need to have something come to closure. And I think there's nothing that precludes a group of people independently from trying to work out an agreement in the next 90 days that is different than the regulations, but absent that, this puts us in the position of having a public hearing in July, going through the process, having people's voices heard, but beginning to implement what is for people who live in the State of Massachusetts a critically important step forward. And just having another study panel is not going to solve this problem; I'm convinced after talking to everybody involved. There have been more study panels on this issue than there have been on issues about kids' healthcare and healthcare reform, and there have been a whole lot of panels on those things."

Council Member Sherman, replied in part, "Then why can't we just go through the accepted process?...It's too fast for me…"

Council Member Pompeo interjected, "It seems like a compromise to me though in that they are allowing the nursing homes to make a decision. If they have an existing contract, they continue with that contract. If they decide not to, they decide not to [have a

private contract].

Council Member Sherman continued, "I'm fearful of the stories we all know, mostly true I'm sure of people calling ambulance services and where fire departments have not been alerted to people being ill and around the corner, or any other first responder even another ambulance service that is closer – that's troublesome to me…"

Dr. Dreyer responded, "What we are doing is addressing what can be in a service zone plan. And service zone plans don't need to be approved until December 31, 2006. So, to the extent that those things are happening, they may continue to happen until there are service zone plans because the only thing this regulation does on an emergent basis that effects change now is to require nursing homes to have policies. And having reviewed a lot of the cases, the kinds of cases you are talking about, I see an urgent need for nursing homes to have policies on this point."

Council Member George, Jr. stated, "It is a tragedy that nursing homes don't have policies and they need a regulation to force them to provide the best service that they can for the people that they are responsible for taking care of. I think that is a tragedy. And I think that takes place in nursing homes, at least some of the things that I have seen and witnessed first hand. A facility may look beautiful. They'll tell you all these things. But then experience it 24 hours a day with a loved one, or someone who has no one that takes care of them, and if something becomes an emergency and the type of response that develops. I think they have a certain responsibility, and they shouldn't be held by the hand to do what they think is right."

Ms. Pompeo said, "I think I have to agree with Mr. George. It's unfortunate that these two things come together at the same time and appear related, but the reality is I think we have to act on an emergency basis because of what Mr. George just said. And that's the critical issue here."

A man from the audience asked the Chair to speak. Commissioner Ferguson replied, "I appreciate that request but today's presentation as I told everybody who called – there is no public discussion and this is not a public hearing on the emergency amendments to the regulations. All interested parties will have the opportunity to make their positions known to the Department and to comment on any testimony submitted by other parties at the public comment hearing which is scheduled for Tuesday, July 6, 2004, at 10:00 a.m., One Ashburton Place, Boston. MA. The Department will review all the testimony that's submitted and will present its findings to the Public Health Council with its final recommendations regarding the amendments. This is no different than other Public Health Council Meetings or usual practice."

Council Member Pompeo made a motion to accept Staff recommendation. After consideration, upon motion made and duly seconded, it was voted: (Chair Ferguson, Ms. Cudmore, Ms. Pompeo, Mr. Thayer and Dr. Williams in favor; Mr. George,Jr. and Mr. Sherman opposed; Ms. Slemenda abstaining [Dr. Sterne absent] to approve the Request to Promulgate Emergency Amendments to 105 CMR 170.000: Emergency Medical

Services System and 105 CMR 150.000: Licensing of Long-Term-Care Facilities; that the emergency amendments be forwarded to the Secretary of the Commonwealth; and that a copy be attached and made a part of this record as Exhibit Number 14,788 .

For the record, the Massachusetts College of Emergency Physicians faxed a letter dated May 21, 2004 to the Public Health Council Members. In closing, the letter said, "If there is a need to clarify how transport should be handled through amendments to the regulations, we strongly believe the amendments should go through the standard process gathering full information from multiple sources before a decision to amend is made. Most importantly, we do not see nor have any idea why there is an emergent need for such amendments at this time."

The meeting adjourned at 10:35 a.m.

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Christine C. Ferguson
Commissioner
Chair

LMH/lmh